

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LOMA J. MARVIN

Claimant

VS.

A-PLUS TRUCKING, INC.

Respondent

AND

FIRSTCOMP INSURANCE CO.

Insurance Carrier

Docket No. **1,036,659**

ORDER

Respondent and its insurance carrier request review of the May 2, 2011 Review and Modification Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on August 2, 2011. E. Lee Kinch, of Wichita, Kansas, was appointed by the Director to serve as a Pro Tem in this matter in place of former Board Member Julie Sample.

APPEARANCES

Lawrence M. Gurney, of Wichita, Kansas, appeared for the claimant. Ryan Wertz, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This is an appeal from a review and modification proceeding. Claimant suffered a work-related accidental injury on January 11, 2007. The nature and extent of her disability

was litigated and on March 12, 2009, the ALJ awarded claimant compensation based upon a 15.5 percent whole person functional impairment. Because claimant continued working for respondent earning 90 percent or more of her pre-injury average weekly wage she was not eligible for a work disability.¹ In April 2010 claimant was demoted and her average weekly wage reduced to less than 90 percent of her pre-injury average weekly wage. Claimant filed for review and modification of the underlying award and alleged that her wage loss rebutted the presumption of no work disability in K.S.A. 44-510e and a work disability under K.S.A. 44-510e would be appropriate. In July 2010 claimant's employment with respondent was terminated.

The ALJ found that claimant was entitled to modification of her March 12, 2009, Award and determined claimant suffered a 28 percent work disability from April 25, 2010, to July 31, 2010, based upon a 0 percent task loss and 56 percent wage loss. And a 50 percent work disability after July 31, 2010, based upon a 0 percent task loss and a 100 percent wage loss.

The respondent requests review of whether the claimant is entitled to a review and modification of the March 12, 2009, Award. Respondent argues that review and modification is improper because claimant has not sustained any increased functional impairment or physical restrictions which would render her incapable of earning the same wages she earned at the time of her accident. Consequently, respondent further argues that because claimant remains capable of earning the same or higher wages, under the plain language of K.S.A. 44-528, she is not entitled to modification of her March 12, 2009, Award.

Claimant argues that the ALJ's Award should be affirmed in all respects. Claimant further argues that the Board has ruled against the respondent's arguments in previous Board decisions citing *Sayre v. Steven Motor Group*, Docket 1,044,567.

The sole issue for Board review is whether claimant met her burden of proof to establish a change in her disability and, if so, the nature and extent of disability, specifically, whether claimant is entitled to compensation for a work disability for the time periods when she no longer made a wage equal to 90 percent of her pre-injury wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

¹ K.S.A. 44-510e(a).

The facts are not disputed. After the March 12, 2009, Award compensating claimant for a 15.5 percent whole person functional impairment, she continued to earn a wage at least 90 percent of her pre-injury average weekly wage. But in April 2010, claimant was demoted to a tandem driver, and began making less money. Claimant filed an application for review and modification of her March 12, 2009, Award on April 14, 2010. Claimant continued to work in this lower paying job until July 26, 2010, when she was separated from her employment effective July 31, 2010, as part of a settlement in a sex discrimination complaint.

Claimant testified that she looked for work, but was unsuccessful in finding employment. She confirmed that throughout the treatment for the underlying claim she asked the physicians not to place restrictions on her activities.² And at the time claimant was separated from her job she was able to perform her job duties. Claimant agreed that her job was terminated for reasons other than her physical ability to perform her job duties.³

K.S.A. 44-528 states:

(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

(b) If the administrative law judge finds that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident, or finds that the employee has absented and continues to be absent so that a reasonable examination cannot be made of the employee by a health care provider selected by the employer, or has departed beyond the boundaries of the United States, the administrative law

² R.M.H. Trans. at 10-11.

³ R.M.H. Trans. at 11-12.

judge may modify the award and reduce compensation or may cancel the award and end the compensation.

(c) The number of reviews under this section shall be limited pursuant to rules and regulations adopted by the director to avoid abuse.

(d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

In the underlying Award issued on March 12, 2009, claimant was awarded a 15.5 percent permanent partial whole body functional disability. Claimant continued in the employ of respondent after her wage reduction in April 2010 until her termination effective July 31, 2010. The review and modification was filed on April 14, 2010, well within the 6-month limitation of K.S.A. 44-528(d).

K.S.A. 44-528 permits the modification of an award in order to conform to changed conditions.⁴ If there is a change in the claimant's work disability, then the award is subject to review and modification.⁵ In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.⁶ Our appellate courts have consistently held that there must be a change of circumstances, either in a claimant's physical or employment status, to justify modification of an award.⁷ The change does not have to be a change in the claimant's physical condition. It could be an economic change, such as a claimant returning to work at a comparable wage,⁸ or losing a job because of a layoff.⁹ The burden of establishing the changed conditions is on the party asserting them.¹⁰

Claimant does not argue that her functional disability has increased. Nor does claimant allege an increase in restrictions as throughout this claim she has requested that the physicians not impose restrictions. Consequently, claimant does not allege a task loss. The only change in this record stems from claimant's reduced wages due to a demotion

⁴ *Nance v. Harvey County*, 236 Kan. 542, Syl. ¶1, 952 P.2d 411 (1997).

⁵ *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

⁶ *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

⁷ *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978).

⁸ *Ruddick v. Boeing Co.*, 263 Kan. 494, 949 P.2d 1132 (1997).

⁹ *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 372, 899 P.2d 516 (1995).

¹⁰ *Morris*, *supra*, at 531.

and her subsequent loss of her job which both resulted in a wage loss under K.S.A. 44-510e and K.S.A. 44-528(d).

Claimant also points out that the language in K.S.A. 44-528(b) is inapplicable to this situation because modification is not being sought due to the employee returning to work. In fact, this case is just the opposite. Claimant has lost her job with the employer. Therefore, the plain language in K.S.A. 44-528(b) does not apply.

The Kansas Supreme Court, in *Bergstrom*¹¹, requires that the fact finder follow and apply the plain language of K.S.A. 44-510e which requires that a post-injury wage loss must be based upon the actual average weekly wage claimant earned while working as compared to the average weekly wage claimant is earning after the injury. Here, claimant was demoted and as a result suffered a 56 percent wage loss. Then claimant lost her job, is not working and has no income. After the loss of her job claimant's wage loss is 100 percent. In looking at the resulting wage loss, *Bergstrom* does not ask why. It merely calculates the loss and applies the resulting number.

This review and modification proceeding simply addresses whether claimant's permanent partial disability has increased. As her income loss means claimant no longer is earning 90 percent of her pre-injury average weekly wage, her permanent partial disability is no longer limited to her percent of functional impairment. Her permanent partial disability is defined as:

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.¹²

Claimant's wage loss initially increased to 56 percent and, after her job termination, to 100 percent. Therefore, claimant's disability has clearly increased and a modification is required.

Respondent argues that the language of K.S.A. 44-510e differs from the language of K.S.A. 44-528. The Kansas Supreme Court, recently in *Bergstrom*¹³, eliminated the

¹¹ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

¹² K.S.A. 44-510e(a).

¹³ *Id.*

requirement that a claimant prove good faith in a post-award job search. The Court ruled that, where the language of a statute is clear, it is not the obligation of a court to resort to statutory construction or to speculate as to legislative intent. The language of K.S.A. 44-510e mandates that once an injured worker is no longer earning 90 percent or more of his or her pre-injury average weekly wage, then the measure of disability is the percentage of task loss averaged with the percentage of wage loss. However, there is a statutory distinction between the work disability calculation in K.S.A. 44-510e and the post-award review and modification language in K.S.A. 44-528, which asks if the worker is earning or is capable of earning the same or higher wages. If so, the original award may be modified, reduced, or eliminated entirely.

The Kansas Court of Appeals, as affirmed by the Kansas Supreme Court, did address this issue pre *Bergstrom*. In *Asay*¹⁴, the Court was asked to determine if the language in K.S.A. 44-528 dealing with an employee's capability to earn the same or higher wages altered the test for determining compensable permanent partial general disability under K.S.A. 44-510e. The Court was comparing the claimant's ability to engage in work of the same type and character that he was performing at the time of his injury (the then effective test for work disability) to the language of K.S.A. 44-528. The Court determined that the language of K.S.A. 44-528 did not justify cancellation of an award unless the claimant had regained the "ability . . . to engage in work of the same type and character that he was performing at the time of his injury."¹⁵ The Court also determined that the language of K.S.A. 44-510e, which had been modified in 1974, trumped the older language in K.S.A. 44-528, ruling that "where there is a conflict between two statutes which cannot be harmonized, the later legislative expression controls."¹⁶

The Board finds that K.S.A. 44-510e controls in this matter over the general language in K.S.A. 44-528 and reflects the legislature's most recent expression of its intent on how permanent partial general (work) disability awards are to be computed. Thus, the test is claimant's actual wage earnings, post award, and not her capability to earn the same or higher wages. Stated another way, where claimant seeks modification because of a subsequent wage loss, the work disability is calculated under K.S.A. 44-510e(a). The Board's foregoing analysis was affirmed in *Serratos*¹⁷ by the Kansas Court of Appeals in

¹⁴ *Asay v. American Drywall*, 11 Kan. App. 2d 122, 715 P.2d 421, aff'd 240 Kan. 52, 726 P.2d 1332 (1986).

¹⁵ *Id.* at Syl. ¶ 4.

¹⁶ *Id.* at 126.

¹⁷ *Serratos v. Cessna Aircraft Company*, No. 104,106 99,895, 253 P.3d 798, WL 2637449. Unpublished Court of Appeals opinion filed July 1, 2011. Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. But they may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion and provide assistance to the court in its disposition.

a recent not designated for publication decision. Claimant has met her burden of proof to establish her work disability increased and the Board affirms the ALJ's Award.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated May 2, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
 Ryan Wetz, Attorney for Respondent and its Insurance Carrier
 Nelsonna Potts Barnes, Administrative Law Judge